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No. 03-1428

Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF AUSTIN, MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, and DAVID ROBERTSON,

Petitioners,

v.

NORMAN MINETA, Secretary of Transportation, MIKE LEAVITT, Administrator of Environmental Protection Agency, LES BROWNLEE, Acting Secretary of the Army, THE UNITED STATES, and LONGHORN PARTNERS PIPELINE, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT LONGHORN PARTNERS PIPELINE, L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overturn the Fifth Circuit's correct use of the only standard of judicial review applicable to the Longhorn FONSI (the APA's "arbitrary and capricious standard") and create a new standard of judicial review applicable to FONSIs alone.

2. Whether this Court should turn NEPA on its head by effectively outlawing the well accepted, environmentally preferable use of "mitigated FONSIs" simply because Petitioners did not like the result below.

RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties. Respondent Longhorn Partners Pipeline, L.P., is a Delaware limited partnership. There is no parent corporation or publicly held company owning 10% or more of the stock of Longhorn Partners Pipeline, L.P.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
PRELIMINARY STATEMENT	1
REASONS THE PETITION SHOULD BE DENIED	2
I. This case does not involve an "important question of federal law"	2
A. The Fifth Circuit applied the only standard of review there is – the "arbitrary and capricious" standard of the APA and Marsh	2
B. Mitigated FONSIs are unquestionably permissible under NEPA	4
i. Mitigated FONSIs are routinely upheld under NEPA	5
ii. The Longhorn mitigation measures are fully enforceable	7
iii. CEQ authorizes mitigated FONSIs in general	9
iv. There are no certain significant impacts from the Longhorn Pipeline	11
v. Petitioners rely on a law review article that actually supports the Longhorn FONSI's validity	12
C. CEQ's guidance to the Lead Agencies was proper	13

TABLE OF CONTENTS – Continued

		Page
II.	There is no Circuit split	16
	A. The Second and Fifth Circuits both use the arbitrary and capricious standard	16
	B. This was not a "close call"	17
	C. This is not an "important issue" that could frequently recur without this Court's intervention	18
III.	The Fifth Circuit made the right decision	18
	A. Petitioners' demands have been fully satisfied	18
	B. The Longhorn EA complies with NEPA	19
	i. The "hard look" standard	19
	ii. The Longhorn EA was unquestionably a "hard look"	19
	iii. Petitioners' improper probability aggregations do not impact the validity of the Longhorn FONSI	23
CONCLUSION		25

TABLE OF AUTHORITIES

Page

CASES

Akiak Native Cmty. v. United States Postal Serv., 213 F.3d 1140 (9th Cir. 2000) 6, 8, 12

Atlantic State Legal Foundation, Inc. v. Browner, 2000 WL 1234659 (S.D.N.Y. 2000) 18

Audubon Soc'y of Cent. Ark. v. Dailey, 977 F.2d 428 (8th Cir. 1992) 6

Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87 (1983) 15, 19

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1998) 20

Brenham Cmty. Protective Ass'n v. United States Dep't of Agric., 893 F. Supp. 652 (W.D. Tex. 1995), *aff'd*, 95 F.3d 49 (5th Cir. 1996) 4

C.A.R.E Now, Inc. v. Faa, 844 F.2d 1569 (11th Cir. 1988) 6

Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982) 6

City of Auburn v. Surface Transp. Bd., 154 F.3d 1025 (9th Cir. 1998), *cert. cenied*, 527 U.S. 1022 (1999) 8

City of New York v. United States Dep't of Transp., 715 F.2d 732 (2d Cir. 1983) 12

Foundation For North Am. Wild Sheep v. USDA, 681 F.2d 1172 (9th Cir. 1982) 20

In Re: Comptroller of the Currency, 156 F.3d 1279 (D.C. Cir. 1998) 14

TABLE OF AUTHORITIES – Continued

Page

J.C. Morris Co. v. Slater, 1998 WL 959658 (N.D. Tex. 1998) 12

Louisiana v. Lee, 758 F.2d 1081 (5th Cir. 1985), *cert. denied,* 475 U.S. 1044 (1986) 6

Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989) ..... *passim*

National Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997) ..... *passim*

Pres. Council, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) 7

Roanoke River Basin Ass'n v. Houston, 940 F.2d 58 (4th Cir. 1991) 6

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 2, 3, 7, 19

Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973) 17

Sierra Club v. DOT, 753 F.2d 120 (D.C. Cir. 1985) 6

Society Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168 (3d Cir. 2000) 4

Stop The Pipeline v. White, 233 F. Supp. 2d 957 (S.D. Ohio 2002) 11

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) 4, 19

Wetlands Action Network v. United States Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000), *cert. denied,* 534 U.S. 815 (2001) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

40 C.F.R. § 1506.7 10

40 C.F.R. § 1508.9 6

5 U.S.C. § 706(2)(A) 2

42 U.S.C. § 4332(C) 5, 6

42 U.S.C. § 4344(3) 11

49 C.F.R. § 195.401(a) 8

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Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 908, 935 (2002) 5, 12, 13

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STATEMENT OF THE CASE

Respondent hereby incorporates by reference as if fully set forth herein the Factual and Procedural History of this case set forth at pages 5-9 of the Fifth Circuit's opinion. App. 5a-9a.

PRELIMINARY STATEMENT

Because they are dissatisfied with the outcome of the Longhorn EA and FONSI which were upheld by the decisions below, Petitioners ask two things of the Court: (1) to rewrite the APA by creating a special subcategory of judicial review for mitigated FONSIs alone (in place of the arbitrary and capricious standard); and (2) to rule that mitigation measures cannot be used in an environmental assessment to reduce potential environmental impacts to insignificance.

Petitioners' first request would have this Court cast aside the APA and its own precedent to create a brand new standard of judicial review applicable only to mitigated FONSIs. Although the Petition never once articulates what this proposed new standard of judicial review should be, one thing is clear: Petitioners' real objective in this case is stopping this pipeline project, APA and precedent notwithstanding. Both the district court and the Fifth Circuit recognized the result-oriented nature of

Petitioners' challenge to the Longhorn FONSI.[1] Both properly rejected it, and so should this Court.

Petitioners' second request would require the Court to ignore CEQ's specific guidance and interpretation of NEPA in connection with the Longhorn project, overturn countless lower court decisions upholding mitigated FONSIs, and legislate a FONSI-specific prohibition into NEPA's existing text. This request lacks any legal foundation and must also be denied.

REASONS THE PETITION SHOULD BE DENIED

I. This case does not involve an "important question of federal law"

A. The Fifth Circuit applied the only standard of review there is – the "arbitrary and capricious" standard of the APA and *Marsh*

Petitioners concede that the Fifth Circuit followed the APA and this Court's precedent in using the "arbitrary and capricious" standard to review the Longhorn FONSI. Pet. at 9; *see* 5 U.S.C. § 706(2)(A); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Marsh v. Oregon*

[1] As noted by the Fifth Circuit, "Herein lies the problem for the Collins plaintiffs. They really don't want more process. Indeed, considering the extensive and comprehensive nature of the EA conducted here, it is unclear exactly what more process would involve. What they really desire is a substantive result: . . . the Collins plaintiffs want this pipeline project killed." App. 18a-19a. Similarly, the trial court observed that "Plaintiffs did not get what they really wanted, which was to stop the Pipeline, but that simply wasn't in the cards dealt by the United States Congress." App. 65a.

Natural Res. Council, 490 U.S. 360 (1989). Undaunted, Petitioners nonetheless argue that a different standard of review should be used for mitigated FONSIs than that used by this Court to review "mitigated EISs" in *Methow Valley* and *Marsh*. Pet. at 9. In making this argument, Petitioners offer only the insupportable claim (addressed below in I.B) that the basic concept of the "mitigated FONSI" – which has been upheld by every federal court to address it – violates the procedural mandates of NEPA.

There is absolutely no legal support for creating a new standard of review simply because Petitioners dislike their result under the existing one. In *Marsh*, this Court held that the arbitrary and capricious standard applied to a decision not to prepare a supplemental EIS. *Marsh,* 490 U.S. at 376. The *Marsh* Court expressly analogized that type of decision to the decision whether to conduct an EIS or, instead, issue a FONSI in the first instance, thus implicitly recognizing the standard's application to a FONSI decision. *Id.* at 374, *cited in National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).[2] Because it involves "primarily issues of fact" involving a high level of technical expertise, a FONSI – like a supplemental EIS determination – requires deference to "the informed discretion of the responsible federal agencies" under the arbitrary and capricious standard. *See id.* at 377.

Petitioners would have this Court disregard the APA's clear directive, its own precedent, and the uniform

[2] The Petition wrongly claims that the Second Circuit applied a different standard of review in *Hoffman* and thus created a circuit conflict with the Fifth Circuit. That claim is addressed *infra*.

lower-court progeny of *Marsh* to second-guess the Lead Agencies' scientific conclusions and CEQ's guidance simply because Petitioners – as recognized by both lower courts – did not like the outcome of the Longhorn EA process. Such result-oriented criticisms uniformly fail in NEPA reviews. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-28 (1980); *Society Hill Towers Owners' Ass'n v. Rendell,* 210 F.3d 168, 183 (3d Cir. 2000); *Brenham Cmty. Protective Ass'n v. United States Dep't of Agric.,* 893 F. Supp. 652, 657 (W.D. Tex. 1995), *aff'd,* 95 F.3d 49 (5th Cir. 1996).

B. Mitigated FONSIs are unquestionably permissible under NEPA

Petitioners specifically agreed in the Settlement Stipulation that mitigation measures should be considered and that a mitigated FONSI was a likely outcome. App. 161a.[3] Yet the bulk of the Petition is dedicated to attacking the general concept of mitigated FONSIs, which Petitioners variously portray as extra-legal "creatures of bureaucratic invention" (Pet. 9, 14), a "widely employed backdoor

[3] Attachment B, Section III.B.2 of the Settlement Stipulation required the "[p]erformance of an overall risk assessment of the Longhorn Pipeline Project consistent with professional risk assessment standards, including discounting the magnitude of potential adverse consequences by the probability of their occurrence and ***taking into consideration mitigation measures*** (both preventive and responsive) that Longhorn has implemented or has agreed to implement." App. 180a; R. 26:6605 (emphasis supplied). The Fifth Circuit specifically noted this agreement by Petitioners in dismissing their objections to "the mitigated nature of FONSI issued here." App. 11a.

mechanism" (Pet. 11), and a "below-the-judicial-radar-screen creation" (Pet. 14)[4] of federal agencies seeking to avoid NEPA's procedural mandates.

Contrary to Petitioners' colorful but misplaced descriptors, mitigated FONSIs are not only permissible under NEPA and routinely upheld by the federal courts, but have been deemed (by a scholar cited by Petitioners themselves) an environmentally preferable alternative to the "typically costly, cumbersome, and largely uninformative" mechanism of an EIS.[5]

i. Mitigated FONSIs are routinely upheld under NEPA

NEPA directs agencies to prepare an EIS for major federal actions that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(C).[6] Agencies may

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[4] This characterization is particularly disingenuous: If mitigated FONSIs flew "below-the-judicial-radar-screen," as Petitioners claim, these proceedings would not be happening.

[5] Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 908, 935 (2002). Petitioners inexplicably cite this article to support their argument for outlawing mitigated FONSIs. A more extended discussion of Professor Karkkainen's article is found *infra*.

[6] Specifically, the law requires that agencies shall:

> [I]nclude in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(Continued on following page)

also prepare an EA to assist them in determining whether or not an action will have a significant effect. 40 C.F.R. § 1508.9. If an agency prepares an EA, it may issue a FONSI if the action inherently has no significant impact on the environment, or if mitigation measures are adopted to reduce potentially significant impacts to a level of "insignificance." Such "mitigated FONSIs" are routinely upheld. *See, e.g., Louisiana v. Lee,* 758 F.2d 1081, 1083 (5th Cir. 1985), *cert. denied,* 475 U.S. 1044 (1986) (*citing Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson,* 685 F.2d 678 (D.C. Cir. 1982)); *see also Sierra Club v. DOT,* 753 F.2d 120, 129 (D.C. Cir. 1985); *C.A.R.E. NOW, Inc. v. FAA,* 844 F.2d 1569, 1575 (11th Cir. 1988) (holding that consideration of "mitigation measures [is] not only appropriate, it is required."), *reh'g denied,* 854 F.2d 132 (11th Cir. 1988); *Akiak Native Cmty. v. United States Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000); *Roanoke River Basin Ass'n v. Houston*, 940 F.2d 58, 62 (4th Cir. 1991); *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992).

The Longhorn FONSI easily satisfies the requirements of a valid mitigated FONSI. It is based on the Longhorn EA, which contains 40 specific mitigation measures that reflect significant input from the Lead

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(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

42 U.S.C. § 4332(C).

Agencies, United States Fish & Wildlife Service ("FWS") and the public. The Lead Agencies determined that Longhorn's slate of mitigation measures: (1) "should render Longhorn's pipeline among the safest in the nation and dramatically safer than the minimum regulatory threshold established by OPS regulations," App. 84a; (2) "produce a set of conditions that have no known precedent in the pipeline industry," App. 84a, R. 30:7565; and (3) reduced pre-mitigation risk levels for the pipeline more than twenty-fold. R. 25:6166a.

ii. The Longhorn mitigation measures are fully enforceable

In examining mitigated FONSIs, courts in some cases have paid particular attention to the enforceability of mitigation measures, rejecting mere voluntary measures. *See, e.g., Pres. Council, Inc. v. Pierce,* 667 F.2d 851, 860 (9th Cir. 1982) (mitigation measures "must be more than mere vague statements of good intention"); *Hoffman*, 132 F.3d at 17 ("When the adequacy of proposed mitigation measures is supported by substantial evidence, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS.").

Notably, however, a finalized mitigation plan like the extensive one agreed to by Longhorn is not required for a mitigated FONSI to be upheld. *See Robertson*, 490 U.S. at 352, 359 ("It would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act . . . NEPA does not require a fully

developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts." *Wetlands Action Network v. United States Corps of Eng'rs*, 222 F.3d 1105, 1122 (9th Cir. 2000) (relying on *Robertson* to uphold mitigated FONSI issued by Corps of Engineers, though mitigation measures were not final), *cert. denied,* 534 U.S. 815 (2001).[7]

As recognized at page 20 of the trial court's Order, App. 42a, Longhorn's mitigation commitments are legally enforceable by OPS because they were incorporated into Longhorn's operations and maintenance manual, to which Longhorn must adhere under DOT regulations. 49 C.F.R. § 195.401(a).[8] Further, Longhorn has committed not to modify its mitigation measures or operating procedures without first publishing its intent to do so on its web site and obtaining the written approval of the Office of Pipeline Safety for any such changes. App. 42a; R. 26:6564. This is a restriction upon Longhorn's operating control that is not placed upon any other pipeline in the country. *Id.* The Lead Agencies took these mitigation measures and their undisputed enforceability into consideration in

[7] The Ninth Circuit in *Wetlands Action Network* also noted that "the fact that the record also contains evidence supporting a different scientific opinion does not render the agency's decision [to issue a mitigated FONSI] arbitrary and capricious." 222 F.3d at 1120-21; *see also Akiak*, 213 F.3d 1140 (9th Cir. 2000) (upholding mitigated FONSI), and *City of Auburn v. Surface Transp. Bd.*, 154 F.3d 1025 (9th Cir. 1998) (same), *cert. denied*, 527 U.S. 1022 (1999).

[8] The FONSI also notes that Longhorn's mitigation commitments are enforceable by the OPS under its continuing approval authority in 49 C.F.R. Part 194. App. 95a, n.11.

finding that operation of the pipeline will not have a significant impact on the environment.

iii. CEQ authorizes mitigated FONSIs in general

Recent statements and studies by CEQ and the NEPA Task Force affirmatively validate the use of mitigation measures to reduce a project's impacts to insignificance.[9] Ignoring these governing policy statements, Petitioners disingenuously claim that CEQ "rejects the basic concept of mitigated FONSIs – at least insofar as they are used to avoid EISs by adding mitigation measures to bring a project's impacts below the significance threshold." Pet. 10.[10] In support of this claim, Petitioners offer this Court only two outdated and indirect statements from CEQ in the 1980s.

The first is CEQ's answer to "Most Asked Question No. 40" of 1981, which concerned the effect of "possible"

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[9] *See* The NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* 69 (Sept. 2003) [hereinafter, the "2003 NEPA Report"] ("CEQ supports use of mitigated FONSIs to reduce project impacts below the significance threshold."); Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years* 19 (Jan. 1997) ("[T]he EA today increasingly includes mitigation measures that reduce adverse effects below significant levels.") [hereinafter, the "CEQ Study," and available at http://clinton4.nara.gov/CEQ/reports/1994-95/rep_toc.html].

[10] In addition to lacking any support from CEQ itself, this statement is illogical on its face: A "mitigated FONSI" by definition involves using mitigation measures to reduce impacts, or in this case *potential* impacts, to insignificance. If there were no significant impacts or potential impacts to begin with, no mitigation would be necessary.

mitigation measures developed during an EA. Pet. 10. The 2003 NEPA Report recognizes CEQ's acknowledgment that "the approach discussed in Question 40 . . . is ***obsolete***."[11] The second is a short 1986 excerpt from the Federal Register in which CEQ addressed the manner in which incomplete or unavailable information is handled in an environmental impact statement. In this statement, CEQ indicated that "the weighing of risks and benefits for the particular federal proposal at hand is properly done after the completion of the entire NEPA process, and is reflected in the Record of Decision." Pet. 15.[12] This statement is inapposite because the Lead Agencies did not weigh the potential risks of the Longhorn project against its benefits.[13] Instead, using both quantitative and qualitative analyses, they determined that the project – as mitigated – would not significantly affect the quality of the human environment.

Furthermore, when the Lead Agencies approached CEQ about NEPA and its procedures, as contemplated by 40 C.F.R. § 1506.7, they were not asking CEQ to weigh the risks and benefits of the Longhorn project. Instead, after acknowledging the "enormous progress" that had been made as a result of the Longhorn Mitigation Plan in reducing the environmental risks associated with the

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[11] 2003 NEPA Report, *supra*, at 69 (emphasis supplied).

[12] *Citing* 51 Fed. Reg. 15,621 (April 25, 1986).

[13] The Petition itself makes this point by omission: Petitioners do not, nor could they, cite any support in the record for their proposition that the Lead Agencies based the FONSI on a determination that the project's future risks are "outweighed by the projected benefits of Longhorn's bringing gasoline to isolated markets." Pet. at 15.

pipeline, EPA and DOT sought CEQ's advice on how to proceed "given the novel and difficult issues raised by applying NEPA in this present context." App. 191a.[14] NEPA charges CEQ with the responsibility "to review and appraise the various programs and activities of the Federal Government ***in the light of the policy*** set forth in . . . this Act . . . , and to make recommendations to the President with respect thereto." 42 U.S.C. § 4344(3) (emphasis supplied). Pursuant to its statutory responsibility and consistent with its regulations, CEQ advised the Lead Agencies on September 7, 2000 that a FONSI was appropriate for the Longhorn project. App. 196a. Under the circumstances, this was entirely appropriate.

iv. There are no certain significant impacts from the Longhorn Pipeline

Unlike cases where a proposed project has unavoidable effects on the environment that need to be "mitigated" (*e.g.*, building a dam, siting a highway or excavating an

[14] Normal operation of the Longhorn project would not pose any significant environmental risk. Therefore, the issue became whether the probability of a release, in light of the possible consequences, elevated the potential environmental impact to a level of significance. DOT, which had experience in pipeline risk assessment (and which was designated the Lead Agency for the risk assessment analysis under the Settlement Stipulation) determined that it did not. EPA, which admittedly had no expertise in this area (and was not the Lead Agency for this part of the analysis), initially disagreed, but recognized that it was out of its area of expertise and asked CEQ for advice. It is a mystery how Petitioners can argue that this legitimate approach to resolving this important issue was improper. *See Stop The Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002) (approving Corps of Engineers' reliance on OPS analysis of pipeline safety given the "superior expertise" of OPS on that issue).

open pit mine), the Longhorn Project, operating under normal conditions, will have minimal adverse effects on the environment. R. 26:6450. Thus, the mitigation measures in the Longhorn EA focus initially upon eliminating the *chance* of an effect on the environment. But since the probability of a release from the pipeline cannot be reduced to absolute zero, the mitigation measures then focus on reducing the severity of any such release should it occur. Multiplying those two factors together, as required by NEPA, results in a conclusion of no significance from future "possible impacts."[15] *See City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 745 (2d Cir. 1983).

v. Petitioners rely on a law review article that actually supports the Longhorn FONSI's validity

Petitioners claim that a 2002 Columbia law review article supports their negative view of mitigated FONSIs. (Pet.11).[16] To the contrary, the article opines that mitigated

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[15] Further, the courts have found that the speculative potential for impacts to occur is insufficient to demonstrate that the Lead Agencies acted arbitrarily or capriciously in issuing a FONSI. *E.g., Akiak*, 213 F.3d at 1146 (upholding FONSI in absence of a substantial question whether alleged negative impacts would *actually occur* and that they would be significant); *J.C. Morris Co. v. Slater*, 1998 WL 959658 (N.D. Tex. 1998) (FONSI was not arbitrary or capricious, and plaintiffs failed to demonstrate that a substantial threat of harm to environment was posed by project).

[16] Karkkainen, *supra*, at 908, 919 & nn.73, 74. Petitioners also cite this article for the proposition that "the number of EISs produced annually has declined steadily over the years despite growth in both the scale and scope of federal activity, while the number of EAs and FONSIs has soared." *Id.* at 934. This factual proposition is not found in

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FONSIs "should result in superior environmental outcomes"[17] and

> appear to be an ***environmental policy success***, not a failure. They achieve the substantive goal that has largely eluded the formal EIS process: effective integration of environmental concerns into project design and implementation by a government that is better informed and more reflective about its role as environmental steward than it would have been absent NEPA. . . . This Article embraces the centrality of the mitigated FONSI to the new NEPA that has emerged out of agency practice and the limitations of the EIS as an environmental management tool.[18]

C. CEQ's guidance to the Lead Agencies was proper

Petitioners' reliance on obsolete and inapplicable CEQ statements in the Federal Register to impugn the Longhorn FONSI ignores the fact that CEQ itself recommended the issuance of a FONSI for the Longhorn project. Attempting to overcome this obvious inconsistency, Petitioners argue that the Longhorn FONSI was a predetermined political decision funneled through CEQ and forced on the

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the record of this case, and Petitioners do not cite any primary source of authority for it.

[17] *Id.* at 908.

[18] *Id.* at 935, 971 (emphasis supplied). While the article does identify some generally applicable concerns with mitigated FONSIs (enforceability of mitigation measures, public involvement, lack of CEQ oversight), *id.* at 936-37, none of those concerns are implicated by the Longhorn FONSI. *See* App. 192a-196a.

Lead Agencies. In other words, Petitioners claim that the EA was not conducted in good faith. This claim fails on several levels.

First, when agency findings are challenged as arbitrary and capricious, the agencies' actions are judged in accordance with their stated reasons. *See, e.g., In re: Comptroller of the Currency*, 156 F.3d 1279 (D.C. Cir. 1998). Thus, the "actual subjective motivation of agency decisionmakers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior." *Id.* at 1279-80. Petitioners have presented no evidence that the Lead Agencies acted improperly or in bad faith when they conducted their "exceedingly thorough and comprehensive" EA for the Longhorn project. App. 12a. Accordingly, Petitioners' entire argument about political maneuverings and improper policy judgments is legally immaterial to this Court's consideration of the Petition.

Even assuming that Petitioners' political argument were legally relevant, the Lead Agencies had already taken a hard look at all relevant factors and made an initial decision not to prepare an EIS before seeking CEQ's advice on NEPA procedure. As recognized by the district court, the FONSI's "ultimate blessing by a political entity does not erase the careful study and designation of mitigation measures reflected in the EA." App. 39a. According to the Fifth Circuit, Petitioners' failure to establish any causal link between the political maneuverings they allege and the Lead Agencies' ultimate decision to issue a FONSI is "detrimental" to the argument that the EA was a foregone conclusion. App. 12a.

Given the length of time it took to complete this EA, the wide-ranging scope of the analysis conducted, the fact

that the Lead Agencies did not seek CEQ's advice on how to proceed until after their analysis was complete, the fact that the Lead Agencies had previously issued a preliminary FONSI, and the unprecedented measures agreed to by Longhorn to ensure the safety of this pipeline, Petitioners' argument that the process had a politically preordained result is far afield.

In addition to their political arguments, Petitioners also incongruously argue that environmental policy cannot be considered in a significance determination under the National Environmental ***Policy*** Act. To the contrary, even aside from its obvious consistency with NEPA's title and goals, environmental policy has been accepted by CEQ, this Court and Petitioners themselves as an appropriate factor in a NEPA review. CEQ's 25th Anniversary Study states: "Fortunately, CEQ survey results indicate that a number of agencies do use EAs to (1) integrate ***environmental values*** into agency decisions and (2) disclose information to affected parties" prior to issuing a FONSI.[19] Paragraph 7 of the Settlement Stipulation provides that the Lead Agencies would either issue a FONSI or a Notice of Intent to Prepare an EIS "in accordance with NEPA regulations and ***policy*** and this Stipulation." App. 161a. Finally, this Court has rejected similar claims in the rulemaking context.[20] Accordingly, even if

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[19] CEQ Study, *supra*, at 20 (emphasis supplied); *see also* Karkkainen, *supra*, at 935 (calling mitigated FONSIs "an environmental ***policy*** success") (emphasis supplied). The Lead Agencies expressly relied on CEQ's Study in the FONSI. App. 93a-94a.

[20] In *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, a pre-*Marsh* decision, this Court held that the "policy judgment" of the Nuclear Regulatory Commission in determining that the permanent

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CEQ did consider NEPA policy in advising the Lead Agencies, as NEPA expressly charges it to do, CEQ's actions were unquestionably valid.

Petitioners cannot have their cake and eat it too. They cannot rely on indirect snippets from obsolete CEQ guidance statements but ignore CEQ's direct application of NEPA's guiding principles to the Longhorn EA. Either CEQ is the authoritative voice in NEPA policy matters, as provided by the statute, or it is not. The Petition's inherent inconsistency in this regard highlights its lack of merit.

II. There is no Circuit split

Petitioners attempt to bootstrap their result-based criticisms of the Longhorn FONSI onto an alleged circuit conflict to justify granting this Petition. Pet. at 18-19. Because there is no such circuit conflict, this attempt must fail.

A. The Second and Fifth Circuits both use the arbitrary and capricious standard

Petitioners claim that "the arbitrary and capricious standard holding sway in the Fifth Circuit" conflicts with an allegedly different "close call" standard announced seven years ago by the Second Circuit in *National Audubon Soc'y v. Hoffman,* 132 F.3d 7, 13 (2d Cir. 1997). Pet. 18.[21] But Petitioners do not reveal that the Second

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storage of certain nuclear wastes would have no significant environmental impact was "within the bounds of rational decisionmaking." 462 U.S. 87, 105 (1983).

[21] Page 18 of the Petition claims that "[t]he lower courts have divided on the standard *agencies are to follow* in deciding whether to

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Circuit in *Hoffman* – just like the Fifth Circuit in this case – applied the APA's arbitrary and capricious standard to a FONSI determination. Petitioners also do not mention that the *Hoffman* court cited the Fifth Circuit's decision in *Save Our Ten Acres v. Kreger* as support for its holding. *Hoffman,* 132 F.3d at 13 (*citing Kreger,* 472 F.2d 463, 467 (5th Cir. 1973)).

B. This was not a "close call"

Even assuming for argument's sake that "close call" were a standard, there is no conflict because nothing in the opinions below indicates that the Longhorn FONSI was a close decision. In fact, the opposite is true. As observed by the Fifth Circuit:

> [I]n many ways, this EA is more akin to a full-blown EIS; it is unclear exactly what more the Lead Agencies could have done to evaluate the significance of the pipeline's impact. . . . Indeed, considering the extensive and comprehensive nature of the EA conducted here, it is unclear exactly what more process would involve.

App. 10a, 18a.

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stop at a FONSI or move to the EIS phase." (Emphasis supplied). However, the only alleged conflict identified by Petitioners is a claimed difference in judicial review standards between the Fifth and Second Circuits. The Petition does not identify any lower court division on NEPA standards for any agency's FONSI determination.

C. This is not an "important issue" that could frequently recur without this Court's intervention

Hoffman was decided seven years ago. In those seven years, no reported decision has relied upon Petitioners' allegedly conflicting "close call" standard to overturn a mitigated FONSI, despite the plethora of NEPA challenges lodged every year.[22] To the contrary, the arbitrary and capricious standard has been uniformly applied as required by the APA and *Marsh*. While results of the decisions applying the standard have, of course, varied depending on the facts of each case, not one decision required an EIS based on a perceived "close call."

III. The Fifth Circuit made the right decision

A. Petitioners' demands have been fully satisfied

When this lawsuit was originally filed, Petitioners demanded "to have the federal government perform a full-fledged review, as required by [NEPA], of the environmental consequences of [the Longhorn Project]." R. 1:000002. Petitioners later agreed, in a Settlement Stipulation approved by the district court, to a detailed Environmental Assessment ("EA") of the Longhorn Project in accordance with NEPA. App. 157a. After conducting the EA over a period of 20 months, the Lead Agencies issued

[22] In fact, only one lower court besides the Fifth Circuit in this case has ever even mentioned the *Hoffman* "close call" language, and that case upheld a FONSI under the arbitrary and capricious standard. *Atlantic State Legal Foundation, Inc. v. Browner,* 2000 WL 1234659 (S.D.N.Y. 2000).

the FONSI with mitigation commitments that the Lead Agencies determined were unprecedented in the industry. As recognized by the district court in its thorough Order of July 19, 2002, Petitioners now have everything they asked for in their Complaint and everything required by the Settlement Stipulation.

B. The Longhorn EA complies with NEPA

i. The "hard look" standard

NEPA guarantees only a process, not a particular result. *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-28 (1980) (per curiam); *Robertson,* 490 U.S. at 352 (NEPA relies "on procedural mechanisms – as opposed to substantive, result-based standards. . . . "). NEPA and its implementing regulations direct federal agencies to take a "hard look" at the environmental consequences of their actions, *Robertson,* 490 U.S. at 350, and create a record that will inform the public that the agency has, in fact, considered those consequences. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,* 462 U.S. 87, 97 (1983). Because NEPA offers only procedural requirements, it "only prohibits uninformed – rather than unwise – agency action." *Robertson,* 490 U.S. at 351.

ii. The Longhorn EA was unquestionably a "hard look"

The exhaustive Longhorn EA is an unblinking "hard look" at the potential environmental impacts of the Longhorn

Pipeline.[23] The EA is over 2400 pages in length, contained in four volumes. It devotes 361 pages to consideration of possible impacts to water quality, 243 pages to public safety, 127 pages to protection of protected plant and animal species, 40 (in addition to the Longhorn Facility Response Plan) pages to emergency response planning, 106 pages to pipeline integrity, corrosion protection and leak detection, 101 pages to project alternatives, and 498 pages to mitigation. The EA incorporates reports from numerous outside experts specializing, *inter alia,* in pipeline operations and safety, identification and protection of endangered species, hydrology, geology, lake and stream modeling, probability and risk analysis, chemistry, and emergency response planning and implementation.

In preparing the Longhorn EA and FONSI, the Lead Agencies divided the Longhorn Pipeline into approximately 6,300 identifiable segments[24] and then used the

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[23] In contrast to the Longhorn EA, the EAs in those rare cases where courts have rejected an agency's decision to issue a FONSI clearly failed to take a "hard look" at a project's effect on the environment. For example, in *Foundation for North Am. Wild Sheep v. USDA,* the court rejected the Forest Service's preparation of an EA because, according to the court, the Service failed to address "certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS." 681 F.2d 1172, 1178 (9th Cir. 1982) (citations omitted). In a more recent case, the Ninth Circuit again rejected a Forest Service EA which insisted that salvage logging operation would not increase sedimentation, but failed to document the effects of logging and roadbuilding on sedimentation. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208 (9th Cir. 1998), *cert. denied,* 527 U.S. 1003 (1998). According to the court, "[t]he Forest Service's only attempt to measure sediment failed when its data collection box overloaded with sediment." *Id.* at 1213.

[24] The initial risk analysis performed in the Draft EA divided the pipeline into approximately 8,000 sections. However, as the Lead

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sophisticated risk assessment methodology described in *Pipeline Risk Management Manual, 2nd Edition* (Muhlbauer, 1996) to calculate the relative risks and probabilities of failure (together, the "Index Sum") for each segment along the entire Pipeline. App. 71a. The higher the Index Sum score for a pipeline segment, the lower the risk of a pipeline failure. The Lead Agencies then considered the consequences of a release of product from the Pipeline by determining which segments along the pipeline were located in areas (a) the most sensitive to a potential pipeline failure (the "hypersensitive" or Tier III areas), (b) very sensitive to a pipeline failure (the "sensitive" or Tier II areas), and (c) the remainder of the pipeline route (Tier I areas). App. 71a. The tiering classifications were based on the proximity of receptors such as ground water, surface water, watersheds, human population, threatened and endangered species and recreational facilities. App. 71a.

The Lead Agencies then required that all segments of the pipeline located in each Tier have specified minimum safety ratings (based upon Index Sums). No segment of the pipeline located in a Tier III area was permitted to have an Index Sum of less than 280 points, which equates to a level of safety equivalent to a new pipeline in a relatively risk-free environment. App. 72a; R. 26:6540a. No segment of the pipeline located in a Tier II area was permitted to have an Index Sum of less than 240 points, which equates to a level of safety equivalent to a pipeline operated by a

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Agencies continued to review and refine the risk analysis for the Longhorn Pipeline, the number of unknown variables that had to be taken into consideration was reduced which resulted in fewer (longer) segments of pipeline being evaluated.

diligent and prudent operator in a relatively risk-free environment. Finally, no segment of the pipeline located in a Tier I area was permitted to have an Index Sum of less than 200 points, which equates to a level of safety significantly higher than minimum DOT requirements. App. 72a; R. 26:6540 & 6540a.

If a segment did not meet the minimum safety standards set by the Lead Agencies, Longhorn was required to adopt mitigation measures that would result in the minimum Index Sum scores being achieved. App. 72a. In addition, to reduce the risk of environmental impact from a pipeline release to a level of insignificance, Longhorn was also required to adopt combinations of mitigation measures appropriate for each pipeline segment to minimize the damage that could occur in the unlikely event of a pipeline release.

To reach their decision, the Lead Agencies and their technical experts were required to evaluate the effectiveness of Longhorn's mitigation measures in reducing pipeline risks to a level of insignificance in terms of potential environmental and safety impacts. This evaluation required an analysis of scientific data relating to pipeline operations, pipeline safety and environmental impacts that was peculiarly within the expertise of the Lead Agencies and their technical experts.

The EA also goes beyond mere compliance with the requirements of the Settlement Stipulation by specifically responding to all concerns expressed by Plaintiffs and others during the public comment period. The EA was developed with input from more than 6000 public comments, generated through six public hearings and extensive consultation with the Plaintiffs, their employees, and

their hired consultants. App. 73a. All public comments were summarized and addressed in Volume 4 of the EA.

After taking the requisite "hard look" at the environmental consequences of the project, the Lead Agencies rationally concluded that the Longhorn project – with its extensive slate of mitigation measures – would not have significant environmental impacts. The EA creates a record that informs the public that the Lead Agencies have, in fact, considered the potential for and consequences of those environmental impacts. The FONSI resulting from the EA was not arbitrary or capricious, an abuse of discretion or contrary to law.

iii. Petitioners' improper probability aggregations do not impact the validity of the Longhorn FONSI

The Petition is peppered with the claim that the Longhorn FONSI was inappropriate because there is a combined 15.3% probability that sometime during the next fifty years there will be an adverse environmental impact affecting a stream, a wetland or drinking water, or there will be an injury or a death. Pet. at 7-8, 16 & 19. This 15.3% number is generated by aggregating five low percentages of something happening sometime during the next fifty years, and including within those aggregated percentages emotive risks such as death or injury (which are of minute probability).[25] By manipulating percentages

[25] *See* App. 84a-88a for the FONSI's analysis of these residual risks.

in this way, Petitioners hope to convince the Court that this project is imminently dangerous.

A review of the actual percentages relied upon by Petitioners demonstrates the fallacy of their arguments:

A. More than half of this claimed 15.3% probability (8%) is attributable to the possibility of a recreational stream being contaminated at some point in time over the next fifty years. R. 26:6571, 6571a, 7068a. Even that contamination would more likely than not result from a spill of less than 50 barrels. R. 26:6571a, n.3. In this regard, it is important to note that a significant part of Longhorn's mitigation plan is aimed at quickly detecting, containing and promptly remediating any such spill.

B. Although there is a 2% chance of injury to a person from a pipeline accident over a 50 year time period, that compares to a 50% chance of injury to that same person in a car accident over the same time period (that is, it is 25 times more likely over the next fifty years for a person to be injured in a car accident than to be injured by this pipeline). R. 26:6436 & 6436a.

C. Although there is a .5% (*i.e.,* 1 out of 200) chance of a death resulting from a pipeline accident in the same fifty years, there is a greater probability (.8%, or 1.6 out of 200) of that same person dying in an auto accident over the same time period. R. 26:6436 & 6436a.

From a different perspective, based upon the probabilities set out in the EA, there is a 99.9% probability that all drinking water sources will be completely protected from any contamination by the pipeline over the 50 year life of the project and a 95% probability that all

wetlands will be completely protected from any contamination during the pipeline's 50 year life.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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